

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

FRANCIS M. GREGOREK (144785)

gregorek@whafh.com

BETSY C. MANIFOLD (182450)

manifold@whafh.com

RACHELE R. RICKERT (190634)

rickert@whafh.com

MARISA C. LIVESAY (223247)

livesay@whafh.com

750 B Street, Suite 2770

San Diego, CA 92101

Telephone: 619/239-4599

Facsimile: 619/234-4599

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

JANINE L. KULESA (*pro hac vice*)

Kulesa@whafh.com

DEMET BASAR (*pro hac vice*)

basar@whafh.com

KATE M. MCGUIRE (*pro hac vice*)

mcguire@whafh.com

270 Madison Avenue

New York, New York 10016

Telephone: 212/545-4600

Facsimile: 212/545-4653

**WESTERMAN LAW CORP**

JEFF S. WESTERMAN (94559)

jwesterman@jswlegal.com

ANNA FAIRCLOTH (275636)

afaircloth@jswlegal.com

1900 Avenue of the Stars, 11th Floor

Los Angeles, Ca. 90067

Telephone: 310/698-7880

Facsimile: 310/775-9777

**LEVI & KORSINSKY LLP**

EDUARD KORSINSKY (*pro hac vice*)

ek@zlk.com

SHANNON L. HOPKINS (*pro hac vice*)

shopkins@zlk.com

NANCY A. KULESA (*pro hac vice*)

nkulesa@zlk.com

STEPHANIE BARTONE (*pro hac vice*)

sbartone@zlk.com

30 Broad Street, 24<sup>th</sup> Floor

New York, NY 10004

Telephone: 212/363-7500

Facsimile: 866/367-6510

*Interim Class Counsel*

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION**

) Case No. CV 14-00428-MMM-JEMx

)  
)  
) **PLAINTIFFS' AMENDED (TO**  
) **INCLUDE TABLES) OBJECTION**  
) **TO THE DECLARATION OF**  
) **EXPERT DENISE MARTIN**

)  
) Judge: Hon. Margaret M. Morrow  
) Mag Judge: Hon. John E. McDermott  
) Date: February 1, 2016  
) Time: 10:00 a.m.

IN RE NJOY, INC. CONSUMER  
CLASS ACTION LITIGATION

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On September 25, 2015, Plaintiffs Ben Z. Halberstam and Kathryn Thomas (“Plaintiffs”) filed with the Court an Expert Supplemental Declaration of Jeffrey E. Harris (“Dr. Harris”) In Support Of Plaintiffs’ Amended Motion For Class Certification (the “Harris Supplemental Declaration”) (Dkt. No. 249-1). On November 23, 2015, Defendant NJOY, Inc. and Sottera, Inc. (“Defendant” or “NJOY”) filed an Expert Declaration of Denise Martin (“Martin”) (the “Martin Declaration”) (Dkt. No. 263), critiquing, in part, the Bayesian hedonic regression analysis set forth in the Harris Supplemental Declaration. Plaintiffs object to Martin’s testimony on the grounds that Martin: (1) is not qualified to offer opinions on Bayesian hedonic regression analysis, hedonic regression, conjoint analysis, or direct method, since she is not an expert and has no experience with these kind of damages analyses; (2) is impermissibly “piggybacking” on the purported expertise and litigation-driven and unreliable conclusions of NJOY’s other proposed testifying expert; and (3) lacks foundation to support her conclusions and opinions because she does not provide sufficient facts or data. For the reasons set forth below, Martin’s opinions are irreconcilable with the standards governing expert testimony.

## OBJECTIONS

### I. Applicable Standards

The admissibility of expert testimony is governed by the framework set out in Federal Rule of Evidence (the “Rule”) 702 and *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993). The rule requires that, to be admissible, “the witness must have sufficient expertise,” *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002), which is established where the witness possesses the sufficient “knowledge, skill, experience, training or education.” *Sterner v. United States DEA*, 467 F. Supp. 2d 1017, 1033 (S.D. Cal. 2006). The party seeking to have expert testimony admitted bears the burden of demonstrating its admissibility by a preponderance of the evidence. *In re Conagra Foods, Inc.*, 90 F. Supp. 3d 919, at 943, n.35 (C.D. Cal. Feb. 23, 2015).

1 Although a qualified expert may base his opinions on facts or data made known  
2 to him, Rule 703 is not a license for an expert witness to simply parrot the opinions  
3 of another expert. *Dura Auto Sys. Of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 612-14  
4 (7th Cir. 2002); *J.B. Hunt Transp., Inc. v. General Motors Corp.*, 243 F.3d 441, 444  
5 (8th Cir. 2001); *United States Gypsum v. LaFarge North American, Inc.*, 670  
6 F.Supp.2d 748, 758 (N.D. Ill. 2009); *Deutz Corp. v. City Light & Power, Inc.*, 2009  
7 WL 2986515 (N.D.Ga. 2009) \*6; see *Brown v. Teledyne Cont'l Motors, Inc.*, 2007  
8 U.S. Dist. LEXIS 18179, \*8 (N.D. Ohio 2007) (finding that expert "must himself be  
9 qualified to render any opinions he would testify to in court, or he would simply be  
10 parroting the opinions of others").

11 Not only is Martin not qualified to testify on Bayesian hedonic regression,  
12 hedonic regression, conjoint and direct damages analyses, but her testimony is not  
13 reliable because it is largely based on her complete and blind reliance on the  
14 declaration of another testifying expert, rather than her own independent investigation  
15 of facts, and her testimony is not based upon sufficient foundational facts or  
16 supporting data.

17 **II. Martin Is Not An Expert With Respect to Bayesian Hedonic Regression**  
18 **Analysis, Hedonic Regression, Conjoint Analysis or Direct Method**

19 Martin is a Senior Vice President of NERA Economic Consulting. Martin Decl.  
20 ¶6; Martin Decl. Ex. 1 (cv). While Martin has a graduate degree in economics, she  
21 has spent the last 25 years at NERA testifying as an expert witness largely on behalf  
22 of defendants (see Martin Decl. Ex. 1 (cv showing education and professional  
23 experience in economics and microeconomics)).<sup>1</sup> Her biography on NERA's website

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24 <sup>1</sup> As Martin testified, except for one case in which she testified for plaintiff in  
25 individual insurance actions (*Underwriters at Lloyd's London v. Allstate Ins. Co.*,  
26 (Court of Common Pleas Ohio, 2015)), she has testified solely on behalf of defendants.  
27 Martin Tr. 70:21-71:8; see Martin Decl., Ex. 1 (identifying 21 cases Martin has  
28 testified in, all of which she testified on behalf of the defendant, except for  
*Underwriters at Lloyd's London*). Indeed, she is currently working on a case with  
Trautman Sanders, counsel for NJOY in this case. Martin Tr. at 71:19-72:3.

1 states that she “has focused her work in three areas: securities litigation, product  
2 liability and mass tort valuation, and labor economics.” (Bartone Dec., Ex. A).  
3 Martin’s curriculum vitae, testimony, training, education and experience demonstrate  
4 that she is not qualified to proffer an opinion on the Bayesian hedonic regression  
5 analysis proposed in the Harris Supplemental Declaration, or Bayesian hedonic  
6 regression, hedonic regression analysis, or conjoint or direct analyses in general.

7 Martin is not qualified by education, experience and training to opine on the  
8 Bayesian hedonic regression model proposed by Dr. Harris. Denise Martin  
9 Uncertified Deposition Transcript, dated December 11, 2015, at 39:16-40:9, 52:3-7  
10 (“Martin Tr.”) (Bartone Dec., Ex. B) (as a teaching fellow, she did not teach classes  
11 on hedonic regression analysis or Bayesian hedonic regression analysis); *id.* at 47:7-  
12 12 (she did not take classes on hedonic regression; hedonic regression was included  
13 in two or three classes she took although it was “not a large percentage”); Martin Decl.  
14 Ex. 1 (cv) (listing professional experience with descriptions, none of which mention  
15 the damages analyses at issue here). Martin admits that she has never done a hedonic  
16 regression analysis herself or Bayesian hedonic regression analysis, nor has she ever  
17 been asked to comment on one. Martin Tr. at 48:16-23, 49:15-24; Martin Decl. ¶6.<sup>2</sup>  
18 Rather, “this is the first time that” Martin has opined on Bayesian hedonic regression  
19 analysis. Martin Tr. at 62:7-11. Martin does not even know if a text on Bayesian  
20 statistical regression exists. Martin Tr. at 50:21-51:4 (“Q: Is there a definitive text on  
21 Bayesian statistical regression? A: I don’t know. . .”).

22 Despite the fact that half of her declaration purports to opine on whether the  
23 results of the types of contingent valuation surveys (conjoint analysis and direct  
24 method) proposed by Dr. Harris could properly serve as “inputs” into his Bayesian  
25 hedonic regression (Martin Dec., ¶¶26-54), Martin has no training or experience  
26 whatsoever in contingent valuation or conjoint analysis. Martin Tr. at 62:14-63:13,

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27 <sup>2</sup> Martin testified that she was asked to opine on hedonic regression once and  
28 “directed” a regression analysis, however. Martin Tr. at 52:11-53:17; 58:23-59:7.



1 75:16-18 (Martin has not taught courses on contingent valuation, performed a conjoint  
2 analysis, opined on conjoint analysis or contingent valuation, or performed a conjoint  
3 survey). Nor does she have experience with the direct method. Martin Tr. at 63:25-  
4 64:3 (Martin admits she has not opined on the direct method). Martin admits that she  
5 is not an expert on implementing conjoint analysis and is not an expert on the direct  
6 method. Martin Tr. at 75:23-76:10; 78:2-12.

7 As demonstrated by her NERA biography, Martin similarly lacks expertise in  
8 opining on damages in consumer fraud cases. *See* Martin Tr. at 25:25-26:14  
9 (explaining she works primarily in securities, class actions and mass torts and product  
10 liability cases); *id.* at 58:19-22 (she has never been involved in individual consumer  
11 fraud cases); *id.* at 67:7-70:17; 73:5-74:8 (going through Martin’s list of cases she has  
12 testified in, stating the subject matter of each case,<sup>3</sup> and stating that none of them,  
13 except for one, were consumer class actions). According to Martin’s biography  
14 posted on the NERA website,<sup>4</sup> Martin “has focused her work at NERA in three areas:  
15 securities litigation, product liability and mass tort valuation, and labor economics.”  
16 Bartone Dec. Ex. A. Notably, there is no mention of expertise in the consumer realm.  
17 *See also* Martin Tr. at 25:21-26:14 (“not more than ten percent” of her work has  
18 involved consumer class actions”). In the five pages of testimony Martin lists in her  
19 “Summary of Testimony/Expert Reports, 2011-2015”, only a single case involved a  
20 consumer class action<sup>5</sup> – the others were unrelated. Martin Tr. at 67:7-70:17; 73:5-  
21 74:8 (going through Martin’s list of testimony and stating the subject matter of each  
22 case, none of which involve consumer class actions); Martin Decl., Ex. 1; Bartone  
23 Dec., Ex. C.

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24 <sup>3</sup> Subject matters included, for example, securities action, bankruptcy, and insurance  
25 allocation. *Id.*

26 <sup>4</sup> <http://www.nera.com/experts/dr-denise-neumann-martin.html>.

27 <sup>5</sup> That case is *Kurtz v. Kimberley-Clark Corp.*, Case No. 1:14cv1142 (E.D.N.Y.).  
28 Martin submitted an expert rebuttal report on the hedonic approach. Martin Tr. at  
64:22-65:23.



1 Martin has not written any peer-reviewed articles in any scholarly or  
2 professional journals. Her cv lists contributions to various NERA monographs, none  
3 of which relate to consumer fraud cases,<sup>6</sup> and none of which is a publication in an  
4 independent, peer-reviewed, scholarly economics journal. She has not produced any  
5 scholarly writings on hedonic regression analysis, Bayesian statistical analysis, or  
6 statistical analysis in general. Additionally, there is no evidence that Dr. Martin has  
7 written or testified about electronic cigarettes or conventional tobacco cigarettes, nor  
8 has she done any independent research on the electronic cigarette or conventional  
9 cigarettes market. Martin Tr. at 204:9-16 (she has not done any independent research  
10 on the electronic cigarette market).

11 Thus, Plaintiffs object that Martin is not qualified to testify with respect to the  
12 Bayesian hedonic regression analysis, hedonic regression analysis, conjoint analysis,  
13 or direct method proposed by Dr. Harris in the Harris Supplemental Declaration, and  
14 there is no foundation for her testimony as an expert on the topic for which she is  
15 offered. *See Sterner v. United States DEA*, 467 F. Supp. 2d 1017, 1033-34 (S.D. Cal.  
16 2006) (holding that a witness that “neither worked nor gained any practical experience  
17 in the field, [ ] [ ] ha[d] not . . . gained specialized knowledge through his education  
18 in the field . . . . ha[d] not been trained . . . [or] received formal training in the field”  
was not qualified to submit an expert declaration under Rule 702).

19 **III. Martin’s Testimony and Opinions Impermissibly Piggyback On the**  
20 **Opinion of Another Expert Proffered by NJOY in This Action and**

21 Martin’s opinion concerning how contingent valuation fits into Dr. Harris’s  
22 proposed Bayesian hedonic regression analysis is based solely the expert report of  
23 Kent Van Liere and is therefore unreliable. This Court and courts nationwide have  
24 held that a testifying expert may not simply parrot the testimony of another testifying  
25

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26 <sup>6</sup> Her work includes, for example, topics on wage and hour settlements, MMSEA  
27 regulations, medicare, predatory lending, product liability, and mutual fund advisory  
28 fees. *See Martin Decl.*, Ex. 1 (cv).

1 expert. *See, e.g., In re Conagra Foods, Inc.*, 302 F.R.D. 537, 556-57 (C.D. Cal. 2014);  
2 *J.B. Hunt Transp., Inc. v. General Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001)  
3 (excluding proposed expert testimony “derivative” of another testifying expert’s  
4 inadmissible testimony); *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609,  
5 612-14 (7th Cir. 2002) (“A scientist, however well credentialed he may be, is not  
6 permitted to be the mouthpiece of a scientist in a different specialty. That would not  
7 be responsible science.”); *In re TMI Litig.*, 193 F.3d 613, 714-16 (3d Cir. 1999)  
8 (expert’s “failure to assess the validity of the opinions of the experts he relied upon  
9 together with his unblinking reliance on those experts’ opinions, demonstrates that  
10 the methodology he used to formulate his opinion was flawed under *Daubert*”).

11 As explained by this Court in mere reliance on another expert’s opinion, such  
12 as Martin’s reliance on expert Kent Van Liere, without independent analysis raises  
13 questions of reliability:

14 ConAgra asserts that Dr. Benbrook's testimony regarding survey data  
15 consists merely of repeating figures generated by studies conducted by  
16 other experts. An expert's sole or primary reliance on the opinions of  
17 other experts raises serious reliability questions. *See Fosmire v.*  
18 *Progressive Max Ins. Co.*, 277 F.R.D. 625, 629 (W.D. Wash. 2011)  
19 (“Dr. Polissar's expert report is deficient in several ways. First, although  
20 his opinions are based on Dr. Siskin's data and methodology, there is  
21 nothing in the record to indicate that Dr. Polissar has tested Dr. Siskin's  
22 underlying data to ensure its reliability or that Dr. Polissar even has  
23 access to Dr. Siskin's underlying data”); *In re Imperial Credit Indus.,*  
24 *Inc. Securities Litig.*, 252 F.Supp.2d 1005, 1012 (C.D. Cal. 2003) (“The  
25 rules do not permit an expert to rely upon excerpts from opinions  
26 developed by another expert for the purposes of litigation”); *see also*  
27 *Tokio Marine & Fire Ins. Co., Ltd. v. Norfolk & Western Ry. Co.*, No.  
28 98-1050, 98-1077, 1999 U.S. App. LEXIS 476, 1999 WL 12931, \*4

(4th Cir. Jan. 14, 1999) (Unpub. Disp.) ("[O]ne expert may not give the opinion of another expert who does not testify"); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985) ("Expert opinions ordinarily cannot be based upon the opinions of others whether those opinions are in evidence or not").

*ConAgra*, 302 F.R.D. at 556-57.

Here, Martin does exactly what the Court cautioned against in *ConAgra*: she relies exclusively on and repeats the opinions of Van Liere, another expert proffered by NJOY, without any independent analysis. Martin's reliance on Van Liere is particularly suspect since Van Liere's underlying conclusions were developed for litigation, rather than in the field. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (courts must ensure that the proposed expert is applying the same "intellectual right that characterizes the practice of an expert in the relevant field"). In fact, Martin candidly acknowledged at her deposition that she relies on Van Liere's declaration (Martin Tr. at 32:10-13, 93:20-24) and has not conducted her own independent analysis to determine the reliability of Van Liere's opinions. Martin Tr. at 77:3-19 ("Oh, I am relying on [Van Liere's] opinions, correct. I believe they are correct based on my understanding of conjoint analysis, but he is the expert in executing conjoint analysis, and I am relying on his opinion here."). Martin admittedly has no experience with conjoint analysis herself. Martin Tr. 63:6-64:4 (has not done or opined in a case on conjoint analysis or the direct method).

Martin's reliance on Van Liere is extremely problematic because she admits that she is relying on Van Liere's criticisms of Harris's conjoint analysis as her basis to conclude Harris's Bayesian hedonic regression analysis will not work.<sup>7</sup> *See* Martin

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<sup>7</sup> Extremely problematic is the fact that Van Liere himself admittedly relies on outdated material. In Section IV of the Van Liere Declaration, he cautions that estimates of participants' willingness to pay derived from conjoint analysis may not correspond to consumers' willingness to pay in the marketplace. Van Liere quotes extensively from an unpublished working paper by Allenby and colleagues, dated

Tr. at 220:4-9 (admitting that she is relying on Van Liere's opinion that Harris's conjoint analysis is flawed, and that she then used Van Liere's opinion to conclude the hedonic analysis would not work).<sup>8</sup> When asked at her deposition about the conjoint analysis, however, Martin was unable to answer a single question, explaining "I don't really have knowledge one way or the other. I have not been involved before in disputes in which conjoint analysis has been proposed or used, so I don't really have a basis for answering that questions." Martin Tr. at 85:15-21; *see id.* at 85:23-90:15; 93:6- 102:21 (unable to answer questions regarding conjoint analysis, deferring to Van Liere's opinion, and explaining it is "not [her] place to be agreeing or disagreeing.").

For example, in par. 5(a) of her declaration, Martin opines that Dr. Harris's proposed application of estimates of consumers' current willingness to pay for the safety attribute as an input into his proposed Bayesian hedonic regression analysis "will generate unreliable results of any price premium for the safety attribute over time." Martin Dec., ¶5(a). For this opinion, she relies completely on Van Liere's opinion that "consumers' contemporary valuations are likely to be different from the valuations consumers had earlier in the alleged class period given ..." Martin Tr. at 103:13-104:22 ("Q: And let me direct your attention to paragraph five A on page 2 .

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October 2013. Van Liere Decl. ¶17. Van Liere does not acknowledge that the final published version of the article came out in 2014 and the paragraphs cited from the unpublished paper do not appear in the published paper. *See also* Uncertified Deposition Transcript of Kent Van Liere, dated December 16, 2015, at 91:25-93:25 (Bartone Dec., Ex. D) (recognizing he cited from the unpublished paper, that there is a published paper, and that he has not looked at the published version). See the contemporaneously filed Plaintiffs' Objection to the Testimony of Kent Van Liere, Sec. 1.

<sup>8</sup> While Martin relies on Van Liere to conclude the Bayesian hedonic model is not reliable, Van Liere testified that it was his "understanding from Dr. Martin's work that the hedonic regression won't work here." Van Liere Tr. at 102:2-6. Van Liere also stated "Yes" when asked if he was "relying entirely on Dr. Martin's report for the concept that – that the hedonic regression portion would be for marginal consumer." *Id.* at 102:11-14.

1 . . . Are you relying on Dr. Van Liere’s opinion in this paragraph? A: yes.”). While  
2 Martin testified that she and Van Liere “discussed” Van Liere’s opinion, Martin did  
3 not remember any questions she may have asked him about his opinion, she did not  
4 ask for any scholarly support for his opinion, and she took no other action to satisfy  
5 herself that Van Liere’s opinion was correct, and she did not study any aspect of the  
6 e-cigarette market herself. Martin Tr. 104:23-106:5. In the absence of Van Liere’s  
7 opinion, Martin could not opine on this issue.

8 Martin’s reliance on Van Liere taints the entirety of Martin’s opinions in the  
9 Martin Declaration concerning inputs from contingent valuation in Dr. Harris’s  
10 Bayesian model. For example, in section C of the Martin Declaration, Martin  
11 purportedly explains why a conjoint analysis cannot “solve problems that will arise  
12 in [Harris’s] hedonic regression.” In this section, however, Martin *solely* cites to the  
13 Rebuttal Declaration of Dr. Kent D. Van Liere (“Van Liere Declaration”). Martin  
14 even confirms that she is heavily relying on Van Liere’s opinions here during her  
15 deposition testimony. For example, ¶41 of the Martin Declaration states, “as detailed  
16 in the Van Liere Declaration, a conjoint model cannot reliably measure all of the  
17 attributes necessary to correct all of the problems that Dr. Harris has acknowledged  
18 will arise in the hedonic regression.” When questioned during her deposition, Martin  
19 confirmed that she is relying on Van Liere there. Martin Tr. at 217:25-218:15, 220:4-  
20 8 (discussing ¶41 and admitting that she is relying on Van Liere’s opinion that  
21 Harris’s conjoint analysis is flawed, and that she used that opinion to conclude the  
22 hedonic analysis would not work); *see also* Martin Decl. ¶41 (“Dr. Van Liere outlines  
23 numerous problems with the proposed approach . . . “). Martin’s Declaration and  
24 deposition testimony similarly confirm that most of Martin’s opinions are, in fact,  
25 based on Van Liere’s conclusions. *See* Martin Decl. ¶ 42 (“Dr. Van Liere concludes  
26 that Dr. Harris will be unable to reliably measure the consumer’s willingness to pay  
27 for the safety claim attribute in his proposed conjoint survey.”); Martin Tr. at 222:9-  
28 23, 236:22-237:10 (explaining that she understands safety cannot be measured by

1 conjoint based on Van Liere's opinion, but that she cannot testify as to how to "break  
2 the collinearity" described in ¶42 because that is something Van Liere testified on);  
3 Martin Decl. ¶44 ("As detailed in the Van Liere Declaration, Dr. Harris will be unable  
4 to classify these products and derive reliable estimates of the willingness to pay . . . .  
5 Dr. Van Liere explained that . . . ."); *id.* ¶45 ("In his declaration, Dr. Van Liere  
6 demonstrates why the results from Dr. Harris' proposed conjoint will not general  
7 reliable estimates."). In fact, when asked about including attributes of a brand without  
8 the name of a brand in the conjoint survey (something Martin discusses in ¶43 of the  
9 Martin Declaration) Martin responds, "Yea, I would say this again is in Dr. Van  
10 Liere's territory . . . ." Martin Tr. at 147:12-25.

11 Similarly, section D of the Martin Declaration, which argues that "Dr. Harris  
12 cannot measure any price premium associated with the alleged omissions using his  
13 proposed method," starts off, "As Dr. Van Liere explains in his declaration." When  
14 asked what "bars Dr. Harris from separately identifying the part-worths" of the  
15 omissions claim, Martin prefaces her answer with, "Again, I don't want to speak for  
16 Dr. Van Liere, but . . . ." Martin Tr. at 239:17-240:6. With respect to Section E of  
17 Martin's Declaration, when asked during her deposition about the use of a conjoint  
18 analysis in the *ConAgra* case Martin cites, versus a conjoint analysis in this Action,  
19 Martin responds "I am not offering an opinion about when [hedonic analysis] is or is  
20 not appropriate. That is Dr. Van Liere's testimony." Martin Tr. at 195:17-196:2. In  
21 response to a question concerning ¶48 under Section E of the Martin Declaration,  
22 Martin (again) conditions her testimony by stating "I am relying in part on Dr. Van  
23 Liere's testimony" and elaborates that she is "relying on him certainly for his  
24 testimony about what a conjoint can and cannot do and why it is not going to be  
workable here." Martin Tr. at 248:4-19.

25 This lack of independent analysis and reliance on Van Liere indicates a  
26 "groupthink" approach rather than a rigorous expert analysis. In fact, Martin testified  
27 to communicating and meeting with Van Liere as early as October 2015. Martin Tr.  
28



1 at 13:2-11, 15:11-12, 29:6-8. At the October 2015 meeting, Martin testified that she  
2 spoke with Van Liere about whether Martin would be able to testify on the Bayesian  
3 hedonic method, and discussed “what the approach was and began to think about how  
4 we would respond, how I would respond if I were going to be retained as an expert.”  
5 Martin Tr. at 29:7-30:15. Martin also discussed the substance of Van Liere’s report  
6 with him and, prior to submitting the Martin Declaration, met with Van Liere “at least  
7 once” and “talked on the phone a number of times.” Martin Tr. at 28:15-22, 32:4-22.  
8 In fact, Martin testified that Van Liere reviewed the Martin Declaration “at least  
9 twice” prior to submitting the final version. Martin Tr. at 33:16-34:3.<sup>9</sup> During those  
10 reviews, Van Liere had “wording comments” to “make sure [the Martin Declaration  
11 was] summarizing his testimony accurately.” Martin Tr. at 34:18-25.<sup>10</sup>

12 Ultimately, Martin’s Declaration amounts to nothing more than saying  
13 “because Van Liere said it, it must be so. Thus, it is my opinion as well.” Thus,  
14 Martin cannot manufacture the illusion of general acceptance and scientific reliability  
15 within the context of litigation by having cross-referencing another expert’s (Van  
16 Liere’s) litigation-driven conclusions. *See Paramount Media Group, Inc. v. Vill. of*  
17 *Bellwood*, 308 F.R.D. 162, 165 (N.D. Ill. 2015) (“The upshot of all this is that Mr.  
18 Quas is just a spokesman for someone else. The expert appears to be Mr. Wiegman  
19 and Mr. Quas — although he is experienced in sales and management in the billboard  
20 industry — cannot explain how Mr. Wiegman got from point A to point B. All he can  
21 do is recite Mr. Wiegman's bottom line. That doesn't pass muster under the  
22 Fed.R.Evid. 702 or 703. . . . Mr. Quas isn't basing an opinion on Mr. Wiegman's work,  
23 he's adopting Mr. Wiegman's work and merely parroting his opinion. ”).

24  
25 <sup>9</sup> Van Liere also testified to having reviewed Martin’s Declaration and that “some  
26 wording change[s]” were suggested if Martin was referring to Van Lierre’s  
27 Declaration, and vice versa. Van Liere Tr. at 161:14-18, 162:4-9.

28 <sup>10</sup> Martin also testified to reviewing drafts and providing comments to the Van Liere  
Declaration. Martin Tr. 36:3-25.



**IV. Martin’s Testimony and Opinions Lack Foundation and Are Not Based On Sufficiently Reliable Facts Or Data**

Plaintiffs also object because the opinions in the Martin Declaration consist of sweeping generalizations that lack foundation and are not based on any supporting data or facts and, thus, are unreliable. Specifically, Martin critiques the conclusions set forth in the Harris Supplemental Declaration without citing a single piece of supporting evidence, and thus lacks foundation for her conclusions. Plaintiffs object to the lack of foundation for Martin’s various opinion, as follows:

1. Martin makes the unsupported assertion that Bayesian hedonic regression “is simply not designed to provide an estimate of how supply or demand would change in response to changes in the composition of product attributes available in the market.” Martin Decl. ¶16. As discussed above in Part II, she has no experience, and thus no foundation, for opining on Bayesian hedonic regression analysis.
2. Martin concludes that hedonic regression fails because it cannot account for “supply and demand decisions.” Martin Decl. ¶10. Martin states that “absent the alleged misrepresentations and omissions, both the demand and supply for NJOY e-cigarettes (as well as other e-cigarettes and potentially other tobacco products) would be likely to change.” Martin Decl. ¶21. The only support Harris cites to, however, is an article from 1974 and Dr. Harris’s testimony that “suppliers might change both prices and product attributes.” Martin Decl. ¶21, n. 25.
3. Martin relies on the opinions of two interested witnesses (Andrew Beaver, the former Chief Marketing Officer of NJOY, and Craig Weiss, the former Chief Executive Officer of NJOY) to conclude that the weights of product attributes making up the price of NJOY’s products were changing in ways that Harris’s model cannot track. Martin Decl. ¶

1 31. Martin, however, has not conducted independent research on the e-  
2 cigarette market. Martin Tr. at 204:9-16.

3 4. Martin provides no evidence as to why Harris would be unable to obtain  
4 the accurate data to conduct his methods. Martin Decl. Sec. VI.A.

5 5. Martin argues that given the “difference between average and marginal  
6 consumers” Dr. Harris cannot “constrain his conjoint results when  
7 applying them to the hedonic regression to ‘tether’ these average, non-  
8 market valuations to actual market prices.” Martin Decl. ¶38. Martin,  
9 however, is not qualified to opine on the conjoint or hedonic damages  
10 analysis, as stated above in Section II.

11 Given that Martin is not an expert on Bayesian hedonic regression, conjoint  
12 analysis or the direct method, her unsupported assertions cannot be credited.

13 **V. CONCLUSION**

14 For the aforementioned reasons, Plaintiffs object to the testimony and opinions  
15 of Martin concerning Bayesian hedonic regression analysis, hedonic regression  
16 analysis, and conjoint and direct analyses, and Dr. Harris’ opinions in this case.

17 **LEVI KORSINSKY LLP**

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19 By:   
EDUARD KORSINSKY  
ekorsinsky@zlk.com  
SHANNON L. HOPKINS  
shopkins@zlk.com  
NANCY KULESA  
nkulesa@zlk.com  
STEPHANIE A. BARTONE  
sbartone@zlk.com  
30 Broad Street, 24th Floor  
New York, New York 10004  
Telephone: 212/363-7500  
Facsimile: 866/367-6510

25 **WOLF HALDENSTEIN ADLER**  
26 **FREEMAN & HERZ LLP** JANINE L.  
27 POLLACK (*pro hac vice*)  
pollack@whafh.com  
28 DEMET BASAR (*pro hac vice*)

basar@whafh.com  
KATE M. MCGUIRE (*pro hac vice*)  
mcguire@whafh.com  
270 Madison Avenue  
New York, New York 10016  
Telephone: 212/545-4600  
Facsimile: 212/545-4653

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

FRANCIS M. GREGOREK  
BETSY C. MANIFOLD  
RACHELE R. RICKERT  
MARISA C. LIVESAY  
750 B Street, Suite 2770  
San Diego, CA 92101  
Telephone: 619/239-4599  
Facsimile: 619/234-4599  
gregorek@whafh.com  
manifold@whafh.com  
rickert@whafh.com  
livesay@whafh.com

**WESTERMAN LAW CORP**

JEFF S. WESTERMAN  
ANNA FAIRCLOTH  
1900 Avenue of the Stars, 11th Floor  
Los Angeles, CA 90067  
Telephone: 310/698-7880  
Facsimile: 310/775-9777  
jwesterman@jswlegal.com  
jthigpen@jswlegal.com

*Interim Co-Lead Counsel*

**THE WILNER FIRM, P.A.**

RICHARD J. LANTINBERG  
444 E. Duval Street  
Jacksonville, FL 32202  
Telephone: 904/446-9817  
Facsimile: 904/446-9825  
rlantinberg@wilnerfirm.com

*Counsel for Plaintiff Kathryn Thomas*

**BISNAR CHASE LLP**

JERUSALEM F. BELIGAN  
TRAVIS K. SIEGAL  
1301 Dove Street, Suite 120  
Newport Beach, CA  
Telephone 949/752-2999

Facsimile 949/752-2777  
bchase@bisnarchase.com  
jbeligan@bisnarchase.com  
tsiegel@bisnarchase.com

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